No. 20221

United States
COURT OF APPEALS
for the Ninth Circuit

BRADY-HAMILTON STEVEDORE CO.,
a corporation,

Appellant,

v.

WATERMAN STEAMSHIP CORP.,

Appellee,

WATERMAN STEAMSHIP CORP.,

Appellant,

v.

MATSON TERMINALS, INC.,
a corporation,

Appellee.

BRIEF OF WATERMAN STEAMSHIP CORP.

Appeal from the United States District Court
for the District of Oregon

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JURISDICTION

The Court's jurisdiction of this appeal is based upon the facts and statutes set forth in appellant Brady-Hamilton Stevedore Co.'s (Brady's) brief at pages 1-2. As noted, the trial court held Brady liable as indemnitor

but dismissed the suit against Matson Terminals, Inc. (Matson).

On May 28, 1965, after service of Brady's Notice of Appeal, Waterman Steamship Corp. (Waterman) filed its protective Notice of Appeal against Matson (R., Vol. 1, 22) thereby giving the Court jurisdiction with respect to the same. 28 U.S.C.A. §§ 1291, 2107.

STATEMENT OF THE CASE

Brady's outline statement of the case (Ap. Br. 2-4) is generally correct and coincides with Judge Kilkenny's factual summary in his opinion (R., Vol. 1, 18-19).

Additional evidentiary facts which are also relevant and further support the District Court's decree are referred to herein under the section captioned "Argument."

SPECIFICATION OF ERROR ON WATERMAN'S APPEAL AGAINST MATSON

The District Court erred in failing to find Matson equally liable with its corespondent Brady on the ground that it breached its express and implied contractual obligation as a master stevedore. In particular, the court below erred in finding that the lack of adequate lighting in the work area was not a causative factor in the accident and injury to longshoreman B. T. Campbell. The court further erred in failing to decree that Matson was equally liable with Brady to indemnify Wa-

terman either because of breaching its implied obligation to perform stevedoring services in a workmanlike manner, or because its negligent conduct was a concurrent cause of the accident for which Matson became liable pursuant to the express indemnity agreement in its written stevedoring contract (R., Ex. 31).

SUMMARY OF ARGUMENT

1. There were more than sufficient facts brought out in the uncontroverted evidence and exhibits adduced at trial to support the lower court's conclusion that:

> "The weight of substantial evidence and the inferences to be drawn therefrom, compels a finding that Brady negligently failed to place the hatch boards in place and such failure rendered the vessel unseaworthy." (R., Vol. 1, 20).

and its consequent Decree (R., Vol. 1, 24) requiring Brady to indemnify Waterman.

2. When the vessel arrived at Oakland, Matson allowed its men to commence working in an area which was inadequately lighted and longshoreman Campbell fell into an open hole shortly thereafter. Such conduct on the part of a stevedore employer was a breach of its obligation to perform services in a competent and workmanlike fashion and also constituted negligence which was a "concurrent cause" of the accident for which Matson is liable to indemnify Waterman under the written stevedoring contract.

ARGUMENT

A. Liability of Brady-Hamilton Stevedore Co.

Brady's Appeal Limited to One Challenged Finding

Brady's "Specification of Error" (Ap. Br. 4) does not comply with Rule 18.2(d) of this Court's rules in that it fails to particularize in any manner wherein the Findings of Fact or Conclusions of Law of the trial judge are alleged to be erroneous. Nevertheless, the specific point of which appellant complains may be found in the opening paragraph of its "Argument":

> "* * * Brady's sole question on appeal is whether there was substantial evidence in support of the court's Finding that Brady failed to place the missing hatchboards." (Ap. Br. 5).

Thus, there is no dispute that the absence of hatchboards in a hatch opening over which longshoremen were required to work constituted an unseaworthy condition, *Pope & Talbot* v. *Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Lahde* v. *Soc. Armadora Del Norte,* 9th Cir., 220 F.2d 357 (1955); nor does appellant challenge that finding by the trial court. Furthermore, both defendants have conceded that Waterman's settlement of the longshoreman's personal injury action against it was $4,000, together with its costs of defense totaling $1,030.33, were reasonable and that their total constitutes the correct amount of damages if the shipowner is otherwise entitled to recover against one or both stevedores.

The only question on Brady's appeal, therefore, is the sufficiency of evidence to support the single challenged finding.

Test Is Whether Trial Court's Findings Are Clearly Erroneous

In an admiralty appeal of this kind the standard is whether a disputed finding of fact by the trial court is so unsupported by the evidence as to be clearly erroneous. Upon reviewing the entire evidence, the appellate court must be "left with the definite and firm conviction that a mistake has been committed by the Court below", *McAllister* v. *United States,* 348 U.S. 19, 20, 99 L. Ed. 20, 75 S. Ct. 6 (1954), or else it should affirm.

This Court has consistently adhered to the foregoing rule. As stated in *Pacific Towboat Co.* v. *States Marine Corporation of Delaware,* 9th Cir., 276 F.2d 745 (1960):

> "In the McAllister case the Supreme Court dealt specifically with a 'finding of fact' that the master of the ship was negligent. It was with respect to this finding that the court there held that 'no greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure.' Since that decision this court has uniformly regarded determinations as to negligence made in admiralty cases as findings of fact which are not to be overturned unless clearly erroneous. * * *" 276 F.2d at 752.

See also, *Furness, Withy & Co.* v. *Carter,* 9th Cir., 281 F.2d 264, 266 (1960) ("To reverse, we must be convinced

that the lower court's findings run clearly counter to that preponderance" [of the evidence].)

A shipowner's suit to recover indemnity from master stevedores for breach of their contractual obligation is no different from any other admiralty cause where libelant has prevailed below. The trial court's findings of fact which support its decree allowing indemnity are entitled to withstand challenge on appeal unless clearly erroneous and appellant has the burden of proof in so showing. *W. J. Jones & Son, Inc.* v. *Calmar Steamship Corp.*, 9th Cir., 284 F.2d 499 (1960).

Finding Fully Supported By the Evidence

The judge believed that the weight of substantial evidence and inferences to be drawn therefrom "compels a finding that Brady negligently failed to place the hatch boards in place" (R., Vol. 1, 20). The basis for that finding consists of the following evidence:

(a) The No. 3 hatch aboard the SS DE SOTO consists of three levels: An upper 'tween deck space; a lower 'tween deck space; and a lower hold space which is divided into a forward hold and two aft deep tanks. The tanks are in a side-by-side position (R., Vol. 2, 7-10).

(b) On January 24, 1961, Brady had two thirteen-man gangs working in No. 3. One of the gangs worked in the forward lower hold area "a/o" (all over) stowing paper, peas, soap, ingots, plywood and canned goods (R., Ex. 5).

(c) The two missing hatchboards which caused the accident of January 26, 1961 were found in the square giving access to the No. 3 lower hold area (R., Exs. 32-1, 2, 3, 4) in which Brady's longshoremen had completed their work and were supposed to have covered up immediately prior to the vessel's sailing from Portland two days before. Both the Portland loading records (R., Ex. 5) and the vessel's log (R., Ex. 6) show that covering up work was undertaken at No. 3 hatch between 1630 (4:30) and 1645 (4:45 p.m.) hours on January 24, 1961, and that all stevedores knocked off and were ashore shortly thereafter. A tug came alongside and the vessel left Portland at 1800 hours (6:00 p.m.).

(d) Pictures in evidence (R., Exs. 32-2 and 32-3) show that it would be easy for longshoremen leaving the lower hold by the forward ladder to overlook the two missing boards at the after end because of the load of dunnage which was lying on top of the after hatch section. There is also evidence that it would have been difficult work to replace the boards and probably would have required moving part of the dunnage with several men working together (Dep. of Glavanich, Ex. 32, 48-49, 60-61).

(e) Once the No. 3 hatch was sealed by longshoremen at the main deck level there was no other way in. There were no escape ladders or other means of access which are sometimes found on various merchant vessels (R., Vol. 2, 5-6). Brady does not deny this (Ap. Br. 8). Nevertheless, appellant surmises

that its employees had replaced the missing hatch boards, although it offered no evidence thereof, and that "one or more members of the crew" could have entered the hatch "to examine the stowage" and could have done so "simply by laying back the tarp on one corner and removing two hatch boards to expose the ladder." (Ap. Br. 7, 8). There is no evidence in the record to support such supposition and the log entries (R., Ex. 6) record no such cargo inspection.

The shipowner employed both a supercargo and checkers (R., Ex. 5) to make sure cargo was safely stowed while it was being loaded and the likelihood of a crew member or mate doing the same thing during an uneventful two-day coastwise voyage is improbable. Furthermore, to get down into the lower hold area during the voyage, a man would have to first unbatten the hatches, uncover the protective tarpaulin, take out the hatch boards at the main deck level, the upper 'tween deck and the lower 'tween deck level.

Brady's entire proposition rests upon the assumption that its own employees put the hatchboards in place when they finished work. It failed, though, to produce any of these Portland longshoremen or its supervisory personnel to so testify. Appellant is thus hardly in a position to fault Waterman for not gathering crew members from different parts of the world four years after an accident to give negative testimony that they did not enter

a hatch area, especially when they had no occasion to be doing so, and there was no record of the hatch being opened between Portland and Oakland.

The trial judge surely took the much more reasonable inference that Brady's employees neglected or were in too much of a hurry, to reinsert the two difficult boards on their way out of the lower hold at 4:30 p.m. on January 24, and that no one entered the hatch after it was then covered up above until Campbell and his fellow longshoremen uncovered and entered the area at Oakland on the afternoon of the 26th.

(f) What the log does show is that members of the crew took the *battens* off the hatches upon arrival at Oakland but that *uncovering* was done by California longshoremen, the same being within the jurisdiction of longshoremen's work under the labor agreements (R., Ex. 6).

Matson Terminals, the Oakland stevedore, came aboard at 1:20 p.m. on January 26, and its longshoremen rigged cargo gear and rain tents at various hatches. The first loading operation commenced at 2:40 p.m. at the No. 2 hatch. The assistant walking boss Glavanich was in charge of the No. 3 hatch on the day of the accident (R., Ex. 32, 6, 52). Sometime after 3:30 p.m. he was present on the main deck when Matson's men uncovered the after section of No. 3 at that level, then went down to the upper 'tween deck level where they again uncovered the after section of the hatch square and

proceeded down to the lower 'tween deck level. They had just begun to remove the tank tops when the accident involving Campbell occurred at 4:05 p.m. (*id.* 8, 10). It was the first time that anybody from Matson had been down to that deck level. (*id.* 16, 17). Matson did no work in the lower hold either before or after the accident (*id.* 57) and its men were down there to uncover the tank tops preparatory to loading in the after deep tank cargo space, not the forward lower hold space (*id.* 33, 40).

Based upon the foregoing evidence, the court below drew the most reasonable factual inference, to-wit: That the employees of Brady-Hamilton Stevedore Co. carelessly failed to replace two hatchboards in the aft section of the square of No. 3 lower 'tween deck when they completed work aboard the vessel on January 24, 1961, and so breached the stevedore's warranty obligation to the shipowner. Such breach was a proximate cause of Campbell's accident when the hatch was reopened less than two days later and Brady was properly held liable as indemnitor.

B. Liability of Matson Terminals, Inc.

Lighting Inadequate When Accident Occurred

The trial court held that the evidence "probably supports a finding that Matson failed to properly light the area in which the longshoremen were working." (R. Vol. 1, 21). Since the Opinion, together with various pretrial

admissions, were designated by the court as its findings and conclusions, no more specific statement was made.

The court's additional comment that the evidence in support of inadequate lighting was "sketchy and indefinite" is somewhat puzzling in view of the fact that Matson's own accident report states:

> "IN WALKING AROUND UNLIGHTED L/T/DECK AREA, HE STEPPED INTO UNCOVERED PORTION OF SQUARE. HE CAUGHT HIMSELF, THUS BREAKING THE FALL, DANGLING FROM L/T/DECK." (R., Ex. 7)

Mr. John Glavanich was Matson's assistant walking boss in charge of No. 3 hatch on the day of the accident and prepared the accident report. (R., Vol. 2, 13). He testified that only one section at the main and upper 'tween deck levels had been uncovered, or roughly one-quarter of each opening (Dep. of Glavanich, R., Ex. 32, 10, 24, 50, 54-55); that the day was "hazy" (*id.* 11); and that the lighting conditions in the area where Campbell fell were "dim" (*ibid*). (The vessel's log (R., Ex. 6) reported rainy weather.)

Although Glavanich testified on direct examination by Matson's counsel that the light "was sufficiently adequate to find your way around, so to speak" (R., Ex. 32, 15), he later qualified the statement by testifying on cross-examination that he lacked any knowledge as to whether the light in the area was adequate at the time of the accident (*id.* 31) and, of course, his report filled out shortly after the accident characterized the area as "unlighted".

The supervisor testified that when he came down into the hold before the injured man was removed (*id.* 12, 52) he saw only one light which was lying on top of the deep tank cover, not in the correct place for the job at hand (*id.* 29). He had no knowledge as to whether the light had been suspended prior to the accident (*id.* 30) nor whether the longshoremen later hung another light in the area before proceeding to remove the tank tops (*id.* 37-38).

Glavanich's opinion that the lighting was "adequate" was "because the men could move around in that area, *and that area only,* with the illumination that was there." (emphasis supplied) When asked "what area?", he stated:

> "A. 3 aft, one section.
> Q. What one section of 3 aft?
> A. That after section." (*id.* 32)

However, he admitted that longshoremen might have to be standing in the forward part of the deck area over the lower hold hatch in the course of removing the tank tops (*id.* 45-46); that the job to be done included swinging the tank top completely clear of the opening and into the wing area of the lower 'tween deck (*id.* 42); that the overhead was "under 7 feet" high at that level (*id.* 39) sharply limiting the area of light cast; and that men removing tank tops might be as much as 28 feet apart (*id.* 37) but in any event would want to be standing "well forward of the tank top cover" when the load was swung (*id.* 45). The missing hatchboards left an opening 9 to 9½ feet long (*id.* 42) which at its closest point was 5 feet from the tank top (*id.* 41).

Glavanich also agreed that the available daylight in the area where the men were working was a lot less than most any other time of the year and under most any other conditions in the hold and testified that it was not possible to rely on daylight alone (*id.* 50). As stated by Brady's counsel, "the shades of night were falling fast" around 4:00 p.m. on an inclement January 26th in Oakland, and Mr. Glavanich concurred (*id.* 51).

The failure to properly light a work area constitutes negligence and a breach of the stevedore's obligation to perform its services in a workmanlike fashion. Where such conduct brings a previously existing unseaworthy condition into play resulting in an accident and injury, the stevedoring company is liable as indemnitor. *Schiavone Terminal, Inc.* v. *Bozzo,* 1st Cir., 289 F.2d 735 (1961); *Crumady* v. *Fisser,* 358 U.S. 423, 79 S. Ct. 445, 3 L.Ed. 2d 413 (1959).

Court Erred in Holding Bad Lighting Irrelevant

> The trial judge found that if there was lack of light it "* * * was not a causative factor in the workman's fall and resulting injuries. It is my finding that the sole and only cause of such injuries was the negligence of Brady in failing to properly replace the hatchboards and the unseaworthy condition resulting therefrom." (R., Vol. 1, 22)

In this case, Matson was performing its stevedoring work aboard the vessel pursuant to a written contract with Waterman (R., Ex. 31). The contract contains an express indemnity agreement in which Matson agreed

to hold the shipowner harmless from any personal injury claims which resulted, among other things, from the "primary *or concurrent*" negligence of the stevedoring company, its agents or employees. In addition, Matson impliedly agreed to perform its stevedoring services in a safe and workmanlike manner and not expose the vessel or her owners to suits by injured longshoremen. *Italia Societa per Azioni di Navigazioni* v. *Oregon Stevedoring Co.*, 9th Cir., 336 F.2d 124 (1964). Hence, Matson is liable to indemnify the shipowner for longshoremen's personal injury claims if the former's negligent conduct was either the principal or merely a contributing cause of the accident.

On this appeal, the question with respect to Matson's liability is identical to that involved in Brady's appeal: Was the court's finding that poor lighting had nothing to do with Campbell's fall into the opening created by the missing hatch boards clearly erroneous? If so, the finding should be rejected and the decree of dismissal against Matson reversed.

Sufficient Lights Would Have Prevented Accident

Campbell, the man who fell, testified that some of the lower 'tween deck area was in darkness (Dep. of Campbell, R., Ex. 3, 18), or at least dim, and when he looked around after coming down the ladder, the hatch square opening to the forward lower hold appeared fully covered (*id.* 19, 26), with a load of dunnage lying on top of the boards (*id.* 29-30). Campbell and the other men had only been in the area a short time before the

accident occurred. It was not until he fell into the opening a few minutes later while assisting in removal of the tank tops that he became painfully aware that several hatch boards were missing in the lower hold square (*id.* 22). Obviously, if adequate lighting to cover the work area had been provided before work actually commenced and the men became absorbed in their task, the dangerous condition would have been noticed. The fact that Campbell actually looked at the area but did not see the opening must be attributable, at least in part, to the poor illumination.

Mr. Glavanich, the stevedore's supervisor, testified that Matson had made no check of the work area prior to sending a gang into the hold, nor did any member of the gang have the duty of checking the area for hazardous conditions before work commenced (Ex. 32, 46-47). The stevedore relied upon the workmen themselves to call attention to any hazardous condition (*id.* 46), and if longshoremen complained to the supervisor about anything unsafe, measures would then be taken to correct the condition (*id.* 47, 48).

The combination of Campbell's testimony, the admissions of assistant walking boss Glavanich, and Matson's own accident report which refers to the "Unlighted L/T/Deck Area" as the reason the man stepped into the open hole, casts great doubt upon the court's finding that lack of proper lighting "was not a causative factor in the workman's fall." (R., Vol. 1, 22). It is respectfully submitted that such finding is contrary to the preponderance of the evidence, is substantially unsupported by the record, and should be rejected. Cf.

Furness, Withy & Co. v. *Carter, supra; Admiral Towing Co.* v. *Woolen,* 9th Cir., 290 F.2d 641, 646 (1961).

No doubt the trial court concluded that employees of Brady-Hamilton Stevedore Co. who failed to replace the boards when they left the hatch at Portland on the afternoon of January 24 were the real culprits and responsibility for the resulting accident should properly rest with their employer. Even so, Matson expressly and impliedly agreed to indemnify Waterman in cases where Matson's negligent acts or omissions were a contributing cause of accidents and Matson should be held equally liable with its corespondent Brady, for failing to light the work area and thus helping bring an unseaworthy condition into play.

CONCLUSION

Waterman Steamship Corp. has been required to pay a substantial sum by reason of an accident resulting from the conduct of appellant Brady in initially creating an unseaworthy condition aboard Waterman's vessel and the subsequent conduct of respondent Matson in bringing that condition into play. There was ample evidence that both stevedores breached their respective contractual obligations to perform the work in a safe, careful manner and not expose Waterman to liability for personal injury claims.

Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either may be held for the entire damage—not because

he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury. *Husky Refining Co.* v. *Barnes,* 9th Cir., 119 F.2d 715 (1941). The same rule has long prevailed in admiralty causes, *Phoenix Insurance Co.* v. *The Atlas,* 93 U.S. 302, 23 L. Ed. 863 (1876); *The Samovar,* N.D. Cal., 72 F. Sup. 574, 589 (1947), and has been applied in cases identical to the one at bar, *Fappiano* v. *United States,* S.D. N.Y., 1959 A.M.C. 197 (1958).

It is respectfully submitted that the decree of the court below requiring Brady-Hamilton Stevedore Co. to indemnify Waterman should be affirmed and the decree dismissing Waterman's suit against Matson Terminals, Inc. should be reversed with directions to enter judgment in favor of Waterman.

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APPENDIX OF EXHIBITS

All references are to Volume 2 of the Record unless otherwise specified.

Exhibit No.	Description	Identified	Received
1	Pleadings in *Campbell* v. *Waterman Steamship Co.*	17-18	18
2	Release signed by B. T. Campbell	29	29
3	Deposition of Campbell	24	25
5	Portland loading records for January 24, 1961 (erroneously identified in transcript as "Court records of Brady-Hamilton")	28	28
6	Log of SS DE SOTO	28	28
7	Accident report, Matson Terminals, Inc.	13	13
8	Letter of September 13, 1963, Matson to Waterman	23	23
31	Stevedoring contract between Waterman and Matson	Pretrial Order	Vol. 1 38 (Order of Dec. 30, 1964)
32	Depositionof Glavanich and Deposition exhibits	31	34
32-1,2,3,4	Photographs of Accident Scene	6-7	7

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JERARD S. WEIGLER, Attorney